CASE RECORDS AND BRIEFS

No. 06-1499

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In The

Supreme Court of the United States

MEGHAN BUSSELL,

Petitioner,

v.

MOTOROLA, INC. AND ADECCO EMPLOYMENT SERVICES, INC.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF OF MOTOROLA, INC. IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Should the Court use this case to define "direct evidence" in the context of a Title VII retaliation claim even though this issue was not addressed by the courts below and undisputed facts not disclosed in the petition show that petitioner has no direct evidence under any definition of that term?

2. Should the Court exercise its certiorari jurisdiction to review an unpublished opinion holding that petitioner's "distort[ed]" and "exaggerate[d]" presentation of the record fails to support her retaliation claims under the standard adopted in *Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405 (2006), which the court of appeals correctly articulated?

LIST OF PARTIES AND RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent Motorola, Inc. ("Motorola") states that it is a publicly held corporation, has no parent company, and no publicly held company owns 10% or more of its stock.

All parties to the appeal in the Eleventh Circuit are listed in the caption of the petition.

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BRIEF OF MOTOROLA, INC. IN OPPOSITION

This case is not a good vehicle for addressing the elements of a Title VII claim. The first issue raised by Petitioner Meghan Bussell ("Bussell") – the meaning of "direct evidence" – was not addressed by the courts below. Further, this issue cannot affect the outcome of this case because undisputed facts not disclosed in the petition show that petitioner has no direct evidence under any definition of that term. The second issue boils down to whether the Eleventh Circuit – after properly stating the standard for retaliation claims – erroneously held in an unpublished opinion that Bussell's "distort[ed]" and "exaggerate[d]" presentation of the record fails to support her claims under this Court's decision in *Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405 (2006). This issue does not warrant review on a writ of certiorari because it is fact-based and does not present any new or errant ruling of law.

COUNTERSTATEMENT OF THE CASE

The Eleventh Circuit found that Bussell's appellate brief "represents a misreading of the record and either distorts or exaggerates the evidence and testimony in the record." *Bussell v. Motorola, Inc.*, 141 Fed. Appx. 819, 822 (11th Cir. 2005). Bussell's present petition for writ of certiorari suffers from similar deficiencies. Pursuant to Supreme Court Rule 15.2, therefore, Respondent Motorola, Inc. ("Motorola") submits the following counterstatement of the case.

1. This Court remanded for consideration of Bussell's retaliation claims

The petition seeks review of the Eleventh Circuit's decision following remand of the case for further consideration in light of *Burlington N. & S. F.R. Co. v. White*, 126 S. Ct. 2405 (2006), which clarified the scope of Title VII's anti-retaliation provision as follows:

> We conclude that the anti-retaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace. We also conclude that the provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant.

Burlington, 126 S. Ct. at 2409.

Because *Burlington* addressed only retaliation claims, the remand affected only Bussell's retaliation claims and only Bussell's retaliation claims are at issue now.

2. On remand, the Eleventh Circuit affirmed because the record did not reflect retaliatory acts that would have been materially adverse to a reasonable employee

The Eleventh Circuit's articulation of the controlling standard in its remand decision tracks the *Burlington* holding:

> In *Burlington Northern*, the Supreme Court considered the scope of the anti-retaliation provision of Title VII, 42 U.S.C. § 2000e-3(a). The Court held that "the anti-retaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the work-place," and "the provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant."

Petition at 2a.

After further briefing and consideration, the Eleventh Circuit found that the *Burlington* decision did not affect its prior opinion for two reasons. First, the clarification that Title VII's anti-retaliation provision reaches non-work-place conduct is immaterial to this case because Bussell challenged only employment-related acts. *Id.* Second, the record contained no evidence of retaliatory acts that "'would have been materially adverse to a reasonable employee.'" *Id.* Accordingly, the Eleventh Circuit reinstated its opinion affirming summary judgment against Bussell because the evidence adduced by Bussell failed to satisfy the *Burlington* standard. *Id.* Like *Burlington*, the Eleventh Circuit's remand opinion addressed only retaliation claims. *Id.*

3. Much of Bussell's statement of the case is not relevant

Bussell's statement of the case relates largely to her claim that a non-supervisory co-worker, Bob Render, subjected her to sexual harassment. *See* petition at 4-7. Bussell's lengthy and graphic account of Render's behavior, however, is not relevant because only Bussell's retaliation claims are at issue, not the alleged sexual harassment itself.

Also irrelevant are Motorola's incident reports. *See id.* at 8-9. It is undisputed that Motorola investigated Bussell's claims and disciplined Render for violating corporate policies. *See id.*; *see also* R2-97-100) (deposition of Martha Jaramillo explaining that Motorola transferred Render so Bussell could "be comfortable in the work place"). This evidence, however, shows accommodation of Bussell, not retaliation against her. As noted by the Eleventh Circuit, Bussell testified that no sexual harassment occurred after she complained to Motorola's Human Resource Administrator, Marcy Covington. *Bussell*, 141 Fed. Appx. at 822.

Although Bussell's description of Motorola's findings is not relevant to her petition, it nonetheless needs correcting to ensure an accurate portrayal of background facts. Contrary to Bussell's suggestion, Motorola did not find that Bussell was subjected to "sexual" harassment. *See* petition at 12. Motorola interviewed Bussell's co-workers, but – despite close

working quarters at the plant – none corroborated Bussell's claims regarding the alleged tattoo incident or other touchings. R2-110-283. Bussell admitted that Render directed his crude remarks to everyone – men and women alike. R1-109-52. Thus, while Motorola found that Render's boorish conduct created a hostile work environment, it concluded that there was no "sexual" harassment. R2-95-98, 121. Covington's contemporaneous notes sum up her findings as follows:

> After speaking with several associates in the department I did not find that Meghan had been sexually harassed. I did find that there has been abusive language in the department.

R2-95-99.

4. Bussell's discussion "distorts or exaggerates" the record

Bussell says that she suffered four different forms of adverse employment action after complaining of sexual harassment: (1) "not being made a permanent Motorola employee"; (2) "being constructively discharged"; (3) "having her pay docked"; and (4) "being given 3-5 times more work." Petition at 20. A review of the transcript pages cited by Bussell, however, reveals that her discussion of the retaliation evidence distorts the record.

"Not Being Made a Permanent Motorola Employee"

The petition asserts that "Bussell's supervisor (Karge) told her she would not be given a permanent position with increased pay and benefits because she 'complained too much' about sexual harassment." Petition at i. Karge, however, was not a Motorola employee. He worked at Adecco Employment Services, Inc. ("Adecco"), the staffing company that found temporary employees for Motorola. *See Bussell*, 141 Fed. Appx. at 820. Karge had no role in deciding whether or not Motorola would hire Bussell as a permanent employee.

The petition omits Bussell's testimony that no one from the decision-maker – Motorola – told her that she would not be hired as a permanent employee because of her complaints:

> Q. [Did you] talk to Laila [Pennington] or anyone at Motorola to say, is it true that I am not eligible for a [*sic*] Motorola employment?
>
> A. No. . . .
>
> Q. You said Tom [Karge] told you you would not become a permanent employee?
>
> A. Tom told me and Russ this. . . . he told me and Russ that it was because I was complaining and because Russ was my boyfriend.

> Q. Did anyone employed by Motorola tell you that?
>
> A. No.

R2-109-168; R2-110-268.

Further, as noted by the district court, the record establishes that "Bussell was never eligible for and thus was never denied a permanent position at Motorola." R3-153-22. At the time Bussell left Motorola, a temporary employee could not be considered for full-time employment until after twelve months of service. R2-82-58-59. Bussell, however, worked as a temporary employee for less than nine months. R2-109-25, 163.

The petition cites to a passage from Bussell's deposition stating that Adecco – not Motorola – told Bussell she would have the opportunity to become a permanent Motorola employee after six months. Petition at 22-23; *see also* R2-109-183. The petition, however, fails to mention that Bussell signed a document stating that "Adecco does not guarantee that full-time employment will be available at the end of the six-month assignment." R2-109-183.

The petition also omits Bussell's testimony that at the time other temporary employees who were supposed to become permanent were being laid-off. R2-110-267-268.

> Q. So, people who were already in the pipeline process to become Motorolans were told sorry, we have a lay off?

A. Yes. Not all of them. . . .

Q. How many actually became Motorolans?

A. Not much. Like I said, very few, like only a couple.

R2-110-268.

"Being Constructively Discharged"

As an example of direct evidence, the petition states that "Karge made a notation in Bussell's termination documents that she '[r]esigned due to continuing harassment.'" Petition at i; *see also id.* at 12, 23. The petition says that "Karge testified that these conclusions were his own, and he agrees with them." *Id.* at 23. The transcript pages cited by Bussell as support for this statement, however, show that Karge's journal entry merely reflected what Bussell had told him:

Q. [Referring to a journal entry dated February 2, 2001,] it says, "Resigned due to continuing harassment and being made to feel uncomfortable. Because the sexual harassment case was so drawn out and not a lot of support in her department which was causing her to get ill. She finally ended her assignment on-site at Motorola to take another position with Adecco." Who put in that entry?

A. I entered that.

Q. Did Meghan help you with that entry?

A. It was all based on – actually help me, no. This is all based on the whole situation and I put that in there.

Q. Then there is an entry on January 29th, "The sexual harassment case is completed, determined after speaking to all the witnesses that Bob [Render] does speak loud and says vulgar things – [A. Hm, hm.] – but none of them heard the things he was saying to Meghan. Moved Bob out of Laila's [Pennington's] department to resolve the issue and to take the sexual harassment class with the whole department." Who said that, who put that in?

A. I put everything that you're looking at there in my name to the left over there.

Q. And on each of these entries were you telling the truth?

A. The way things are put in we question the person and this is how she felt, so basing how she felt is the reason I look at. I mean, we have different reasons to pick from and she felt it was a hostile environment so that's what I put. . . .

Q. Where does it say she felt that?

A. Right here, between her and I.

R2-112-173-174.

According to Bussell, "[t]here is additional direct evidence of constructive discharge, because Kathy Brodeur (one of Adecco's managers and Karge's supervisor) testified that Bussell did not quit. (R2-99-92)." *Id.* at 23. Bussell then says that "Brodeur believes that Bussell was essentially forced out of her employment 'due to continuing harassment.' (R2-99-168)." *Id.* A review of the transcript pages cited by Bussell, however, shows that Brodeur's testimony actually compels the opposite conclusion:

> Q. Did you ever have any discussions with Meghan just before the time she left?
>
> A. I believe we spoke – not directly, the communication was a lot with Tom Karge but for reinforcement and to put her in a comfortable working condition we did explain that she – if she was interested she could – we would contact the Fort Lauderdale office or another office for another assignment. . . .
>
> Q. So, that conversation about referring her to the Fort Lauderdale office, was that the day that Meghan quit?
>
> A. I don't think she – well, she didn't quit. I believe, from what I could recall, she went on an interview with the new client's assignment, went on the interview first and then accepted the position, if I can recall the steps. I don't think she came in and quit, terminated her assignment at Motorola first and then went to the Fort Lauderdale office.

As I remember it, I think she went on the interview first. . . .

Q. [Referring to Karge's journal notes,] it says, "Resigned due to continuing harassment and being made to feel uncomfortable because the sexual harassment case was so drawn out and not a lot of support in her department which was causing her to get ill. She finally ended her assignment on site at Motorola to take another position with Adecco." Did you ever see that statement in her file?

A. I didn't read the – I mean, we had so many people coming and going I didn't read this particular one, no.

Q. Is this statement consistent with what you thought happened?

A. No. . . .

Q. Did you know that she resigned due to continuing harassment?

Mr. Loffredo: Object to form.

The Witness: Yeah. No, I wasn't – I knew of her going for interviews for a position elsewhere so – not due to continue being harassed, no.

R2-99-91-92, 167-168.

"Having Her Pay Docked"

In an attempt to buttress her retaliation claim, Bussell says that "Motorola admitted on page 48 in its Brief that Bussell was docked pay." Petition at 10; *see also id.* at 20. It is undisputed, however, that Adecco – not Motorola – was responsible for paying Bussell. R2-110-266. Further, the page cited by Bussell stresses that "Bussell admits that, on the one occasion she was sent home by Motorola, it was *with* pay. [R2-78-161]." While Motorola pointed out that Bussell claimed that Adecco – not Motorola – sent her home without pay on the day that she resigned and on one other day when she left work early, Adecco has made clear that it had no obligation to pay Bussell for time-not-worked because Bussell was only a temporary employee. *See* Brief of Appellee Adecco Employment Servcs., Inc. at 39, *Bussell v. Motorola, Inc.*, 141 Fed. Appx. 819 (11th Cir. 2005) (No. 04-12120).

"Being Given 3-5 Times More Work"

Bussell claims that she "was given more than 3-5 times the work as similarly situated co-workers were given." Petition at 10. She was upset because three boxes of phones were "dumped" on her desk for her "to take care of." R2-110-293. She also was asked to perform some quality control functions in which she reviewed the work of other assemblers. R2-110-260-268. Bussell, however, testified that she was flattered by this work, and was able to get assistance with it from "one of the assemblers or one of the repair girls."

R2-110-262, 264. She was told that she was being asked to do this work because she was a good employee. R2-110-217, 262-264. Bussell thought that she was in fact considered a good employee by Motorola management.

> Q. Do you have any reason to believe that Johnny was lieing [*sic*] to you when he said Laila [Pennington] asked you to do that work through him, because she thought you were doing a good job?
>
> A. No, none.

R2-110-264.

REASONS FOR DENYING THE PETITION

1. This case is not a good vehicle for deciding the first question – the definition of direct evidence – because neither the rulings nor record below raise this issue

Bussell's first question asks this Court to address various definitions of direct evidence used by circuit courts in employment discrimination cases. This case is not a good vehicle for defining direct evidence, however, because neither the rulings below nor the record raise this issue. *E.g., United States v. Williams*, 504 U.S. 36, 41, 112 S. Ct. 1735, 1738-39 (1992); *City of Springfield v. Kibbe*, 480 U.S. 257, 258-59, 107 S. Ct. 1114, 1115 (1987).

In the district court, Bussell argued that she had direct evidence of retaliation because, according to

her, Karge, her Adecco supervisor, had told her that her Motorola supervisor, Pennington, had told him that Bussell would not get a permanent Motorola position because she complained too much. Motorola's principal response was that the alleged statement was inadmissible as double hearsay. But, the district court never determined whether the statement was either hearsay or direct evidence. Instead, it held that there was no adverse employment action as necessary to prove a Title VII violation because Bussell voluntarily resigned before being eligible for the permanent position at Motorola. R3-153-22. The court of appeals simply affirmed the summary judgment "for the reasons set forth in the district court's order." *Bussell*, 141 Fed. Appx. at 823. Accordingly, there is no ruling on the meaning of direct evidence for this Court to review here.

Further, this issue cannot affect the outcome in this case because Bussell has no direct evidence under any definition of that term. Regardless of any debate over the meaning of direct evidence, Bussell notes that "courts agree on what is *not* direct evidence – *e.g.*, statements by non-decisionmakers, statements by decisionmakers unrelated to the contested employment decision, and other 'stray remarks.'" Petition at 16 (quoting *Fakete v. Aetna, Inc.*, 308 F.3d 335, 338 (3d Cir. 2002)). As explained by Justice O'Connor's concurring opinion in *Price Waterhouse v. Hopkins*:

> [S]tray remarks in the workplace ... cannot justify requiring the employer to prove that its hiring or promotional decisions

> were based on legitimate criteria. Nor can statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself, suffice to satisfy the plaintiff's burden in this regard.

Price Waterhouse v. Hopkins, 490 U.S. 228, 277-78 (1989) (O'Connor, J., concurring); *see also Hemsworth v. Quotesmith.com, Inc.*, 476 F.3d 487, 491 (7th Cir. 2007); *Peyton v. Kellermeyer Co.*, 115 Fed. Appx. 825, 830 (6th Cir. 2004).

The four statements cited by Bussell as direct evidence are precisely what courts agree "is *not* direct evidence" of retaliation or retaliatory constructive discharge by Motorola:

1. Bussell's statement that Karge – an Adecco employee – told her that Pennington told him that Motorola would not give Bussell a permanent position, for which she was not yet eligible, because she complained too much;

2. A journal kept by Karge reflecting that Bussell told him that she was taking a new job that Adecco found for her because she felt that there was a hostile work environment at Motorola;

3. Testimony from Brodeur *denying* that Bussell "was forced out due to continuing harassment," and clarifying that Bussell interviewed for her new job before quitting her temporary position at Motorola; and

4. An incident report showing that Motorola investigated Bussell's claims and disciplined Render, who was not in a supervisory position, because his crude comments violated company policy.

The first statement is not direct (or circumstantial) evidence because it is unrelated to any employment decision. *Id.* Bussell never was eligible for a permanent position at Motorola, and no employment decision was pending or imminent when she left. Indeed, the record suggests that no new permanent positions were available when Bussell resigned. Bussell admitted that, due to downsizing, Motorola was laying-off employees who were supposed to transfer from temporary to permanent status.

Further, the first statement does not qualify as direct (or circumstantial) evidence because it was not made by a decision-maker. *Id.* Karge was not a Motorola employee, and nothing in the record suggests that Pennington had authority to make decisions on permanent hires. Of course, this statement also fails to support Bussell's claim because it is inadmissible hearsay. *See, e.g., Zaben v. Am. Prods. & Chems., Inc.*, 129 F.3d 1453 (11th Cir. 1997).

The second statement, the Karge journal entry, is not direct (or circumstantial) evidence because it reflects only Bussell's view, not that of her employer. Again, this is not a statement by a decision-maker. The third statement, Brodeur's testimony, actually

contradicts Bussell's claims and shows she suffered no harm. Similarly, the last item is not direct or circumstantial evidence of retaliation or constructive discharge. It shows only that Motorola responded to Bussell's complaints by investigating and disciplining Render. Bussell admitted that Render never bothered her again after Motorola began its investigation.

In sum, granting review on the first question would waste the Court's resources because the question presented is not properly framed by the decisions below and is not relevant to the record in this case.

2. The second question – whether the Eleventh Circuit misapplied a correct statement of the *Burlington* standard to Bussell's distorted presentation of the record – does not satisfy the criteria for certiorari jurisdiction

Bussell has not identified a split in the circuits on the *Burlington* holding. She points out that the post-*Burlington* decisions from other circuits are consistent. *See* petition at 26-27. Her claim that the Eleventh Circuit "eschews" the new *Burlington* standard ignores the language of the remand opinion – which quotes *Burlington* – and distorts the record. The Eleventh Circuit rejected Bussell's retaliation claims because Bussell failed to adduce evidence of retaliation "that 'would have been materially adverse to a reasonable employee.'" Petition at 2a. This holding is, on its face, consistent with the *Burlington*

rule. Moreover, the opinion below cannot create a circuit split because it is unpublished and thus does not represent the law of the Eleventh Circuit. *See* Eleventh Cir. Rule 36-2.

Bussell's second argument, therefore, boils down to her view that the unpublished opinion below misapplied a properly stated rule to the particular facts of this case. This issue, however, does not satisfy the criteria for certiorari jurisdiction. "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Supreme Court Rule 10. Certiorari is particularly inappropriate here because it would require this Court to second-guess the Eleventh Circuit's conclusion – after a thorough *de novo* review – that Bussell's statement of the case "represents a misreading of the record and either distorts or exaggerates the evidence and testimony in the record." *Bussell*, 141 Fed. Appx. at 822.

In any event, the decision below is correct. In *Burlington*, the Court made clear that "[t]he anti-retaliation provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm." *Burlington*, 126 S. Ct. at 2414. Such harm must be "materially adverse" because "Title VII . . . does not set forth 'a general civility code for the American workplace.'" *Id.* at 2415 (quoting *Oncale v. Sundowner Offshore Servcs., Inc.*, 523 U.S. 75, 80 (1998)). It prohibits "only those" retaliatory acts "that would have been materially adverse to a reasonable

employee." *Id.* at 2409. Further, the *Burlington* standard "does *not* require a reviewing court or jury to consider 'the nature of the discrimination that led to the filing of the charge.' . . . Rather, the standard is tied to the challenged retaliatory act." *Id.* at 2416 (emphasis original).

After this Court remanded the case for consideration in light of *Burlington*, the Eleventh Circuit required further briefing from all parties. In its supplemental brief, Motorola pointed out that Bussell never alleged any non-workplace retaliation. The *Burlington* holding that Title VII applies to non-workplace retaliation, therefore, has no impact on this case. Further, the objective standard adopted in *Burlington* does not undermine the Eleventh Circuit's previous rejection of Bussell's employment-related retaliation claim because this is precisely the standard advocated by Motorola in its initial briefing: "A plaintiff must demonstrate that a reasonable person in her position would view the employment action in question as adverse; the standard is objective." Answer Brief of Motorola at 45 (citations omitted), *Bussell* (No. 04-12120); *see also Cotton v. Cracker Barrel Old Country Store*, 434 F.3d 1227, 1234 (11th Cir. 2006) (instructing, in pre-*Burlington* case, that the challenged action "'must be materially adverse as viewed by a reasonable person in the circumstances'"). As found by the Eleventh Circuit in its initial opinion and on remand, the record in this case fails to satisfy this standard.

The Supreme Court upheld the jury award on the retaliation claim in *Burlington* because the plaintiff,

White, presented proof that her employer first demoted and then wrongfully suspended her without pay as a result of her discrimination charge. In particular, White was reassigned from forklift duty, which was deemed to be a less arduous and more prestigious position, to standard track laborer tasks. *Id.* at 2417. She later was wrongfully suspended without pay for 37 days. *Id.* The record documented the harm caused by this protracted loss of income. *Id.* Bussell, however, has not presented comparable evidence of material adversity from the alleged retaliation.

Because Bussell was never eligible for a permanent position before she left Motorola, Karge's alleged statement that Bussell would never be a permanent employee reflects only a future possibility, not actual adverse action as required by *Burlington*. *See Burlington*, 126 S. Ct. at 2424; *see also Dar Dar v. Associated Outdoor Club, Inc.*, 201 Fed. Appx. 718, 723 n.3 (11th Cir. 2006) (noting that a complaint log is not actionable under *Burlington* unless it is used as the basis for disciplining or terminating the employee); *cf. Dick v. Phone Directories Co., Inc.*, 397 F.3d 1256, 1267-1269 (10th Cir. 2005) (affirming conclusion that an unrealized threat did not constitute adverse action).

Karge's journal entry shows that Bussell suffered no material adversity as required to prove a retaliation claim under *Burlington* because Bussell accepted another job that Karge found for her before she left her temporary position at Motorola. *See* R3-153-22.

As found by the district court and the Eleventh Circuit, this is not evidence of constructive discharge.

The "dock-in-pay" issue is not relevant to the summary judgment in Motorola's favor because Bussell has admitted that "[her] paychecks were from Adecco," R2-79-266, and that Motorola never sent her home without pay. R2-78-161. Further, Adecco's failure to pay Bussell for hours-not-worked on the day she resigned and on one other day when she went home early is not actionable retaliation under *Burlington* because there is no evidence that other temporary employees were paid for time-not-worked under similar circumstances.

Bussell says that her Motorola supervisor, Pennington, yelled at her and called her a liar and a baby. Petition at 21. Bussell, however, testified that she did not consider this conduct to be retaliatory. R2-110-292-294. Instead, Bussell thought that Pennington retaliated against her by giving her more work. *Id.* at 293. She testified that, after complaining about Render, "right after that, I'm getting all this work, so that's what I mean by retaliatory. I'm not saying because she called me a baby she's retaliating against me." *Id.* Moreover, Bussell omitted name-calling from her list of alleged retaliatory acts in previous filings. *See* petition at 20; *see also Burlington*, 126 S. Ct. at 2415 (noting that "Title VII . . . does not set forth 'a general civility code for the American workplace' ").

Although Bussell thought that Pennington increased her workload, an employee's subjective

view of workload fluctuations does not show materially adverse action as a matter of law – particularly where other employees are asked to help with the work. *See Fane v. Locke Reynolds, LLP*, 480 F.3d 534, 539 (7th Cir. 2007); *Jones v. Barnhart*, 349 F.3d 1260, 1269-70 (10th Cir. 2003); *Tran v. The Boeing Company*, 190 Fed. Appx. 929, 934 n.3 (11th Cir. 2006). Further, this claim fails because there is no evidence of pretext to rebut the uncontroverted proof that Motorola assigned Bussell this work because she was a good employee. *See Fane*, 480 F.3d at 539; *Deters v. Rock-Tenn Co., Inc.*, No. 06-4356, 2007 WL 2404515 at *13-14 (6th Cir. Aug. 22, 2007); *Beard v. 84 Lumber Co.*, 206 Fed. Appx. 852, 855 (11th Cir. 2006).

Thus, unlike the employee in *Burlington* who was demoted from a position of prestige to arduous manual tasks, Bussell's new assignments involved an added degree of responsibility and reflected her employer's confidence in her abilities. R2-79-189, 262, 264. Unlike the employee in *Burlington* who lost over a month's pay, Bussell was never eligible for the economic benefits that she says she lost as a result of complaining. Unlike the scenario in *Burlington*, Motorola and Adecco responded to Bussell's complaints and accommodated her – first by transferring and disciplining Render and then by providing her with other employment opportunities. The record in this case is devoid of retaliatory acts that would be materially adverse to a reasonable employee.

Accordingly, the second question does not warrant the exercise of this Court's certiorari jurisdiction

because: (1) there is no split in the circuits on the *Burlington* standard; (2) the asserted error relates only to factual findings; and (3) the Eleventh Circuit's decision on remand is correct.

CONCLUSION

The Court should deny the petition for writ of certiorari.

Respectfully submitted,

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